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No. 88-1943

In the Supreme Court of the United States

OCTOBER TERM, 1989

OFFICE OF PERSONNEL MANAGEMENT, PETITIONER

v.

CHARLES RICHMOND

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In our opening brief, we observed (Br. 11-12) that this Court has consistently refused to hold the government estopped from enforcing the public laws, and noted that this case fits easily within those precedents. We then reviewed the fundamental principles and practical considerations that underlie this Court's holdings. First, Congress, acting against the background of the rule precluding such estoppel, has never waived the sovereign immunity of the United States to the assertion of estoppel against it. Gov't Br. 12-19. Second, action by the Executive or the Judicial Branch giving the force of law to a misrepresentation by a government official or agency would contravene the basic separation of powers principle that only Congress can legislate. Gov't Br. 20-34. Third, estoppel of the government would disserve the public interest, fueling litigation and exposing the government to enormous potential liability. Gov't Br. 34-36.

As we have shown (Br. 37-38), these dictates are not affected by the presence or absence of "affirmative misconduct." Rather, recognition of detrimental reliance is warranted only when, as a result of official misconduct, subsequent enforcement of a statute is rendered either unconstitutional or unwarranted on the statute's own terms. The question at that point is no longer one of estoppel, but one of enforcing substantive law. Gov't Br. 39-43. In this case, there is no constitutional obstacle or warrant in the statute itself that would justify refusal to enforce the terms of the statute as written. Gov't Br. 43. Indeed, even if there were occasions on which the government could be estopped, this would not be one of them. The respondent has not demonstrated that his reliance on the misinformation provided him was reasonable, let alone that the conduct of Navy personnel in this case was so egregious as to justify disregard of the applicable law. Gov't Br. 44-47.

The bases of our disagreements with respondent, both as to the principles that prohibit the application of estoppel against the government and as to the meaning of this Court's precedents applying those principles, are fully laid out in our opening brief. We therefore limit our reply to specific areas where we believe the respondent has failed to come to grips with our argument or has made an error that calls for clarification.

1. a. Respondent argues (Br. 22-24) that an "erosion" of the doctrine of sovereign immunity "has proceeded to the point that it cannot stand as a prohibition against estopping the government"; it thus becomes "irrelevant" that Congress has not expressly consented to the application of estoppel (Br. 10-11, 26-28). This assertion is both factually[1] and conceptually inaccurate.

[1] This Court has in recent cases repeatedly confirmed the vitality of the doctrine of sovereign immunity. See *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *Lehman* v. *Nakshian*, 453 U.S. 156, 160-161 (1981); *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Testan*, 424 U.S. 392, 399 (1976).

Since the barrier posed by sovereign immunity is jurisdictional, "[c]onsent alone gives jurisdiction to adjudge against a sovereign." *United States* v. *United States Fidelity Co.*, 309 U.S. 506, 514 (1940). "[T]he terms of [that] waiver of sovereign immunity define the extent of the court's jurisdiction." *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986). Thus it will not do to say that a device allowing recovery not otherwise available against the government "deriv[es] from the equitable powers of the juridiciary." Resp. Br. 10-11. Rather, a court can only exercise its equitable powers in cases in which it is vested with jurisdiction, and the source of that jurisdiction must be "affirmative statutory authority." *United States Fidelity Co.*, 309 U.S. at 514. The absence of consent in 5 U.S.C. 7703 to the application of estoppel against the government – an absence that is especially significant in view of the "no estoppel" background against which the statute was written (see Gov't Br. 13-14) – is therefore far from "irrelevant"; it is dispositive. Nor does respondent rebut our point that the lack of congressional consent is underscored by the exclusion of all misrepresentation claims from the scope of the Federal Tort Claims Act.[2]

Finally, respondent errs in claiming (Resp. Br. 25) that the application of estoppel is analogous to this Court's recognition of "equitable considerations" when it acts to remedy violations of the constitutional guarantee of equal

[2] Respondent raises in a footnote (Br. 28 n.14) and for the first time the claim that the review provision of Section 7703(c)(1) prohibits, by its own terms, the government's actions here. That claim is without merit for the reasons stated in our opening brief (at 16).

protection. In the case of a statute held to violate that guarantee, the Court modifies the relief specifically authorized by Congress only so far as necessary to assure the legislation's compatibility with the highest law governing Congress and the courts—the Constitution. The issue in such cases, as this Court has repeatedly made clear, is how best to implement congressional intent in light of the fact that full effectuation of that intent is barred by constitutional mandate. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 739 n.5 (1984); *Welsh* v. *United States*, 398 U.S. 333, 363-367 (1970) (Harlan, J., concurring in the result).

b. In response to our argument on separation of powers, respondent contends (Br. 29-33) that our position involves the simplistic assertion that there must be a hermetic separation of the three branches. However, we neither make nor need to make any such assertion.

Rather, we argue (Br. 20-24, 26-28) that separation of powers principles are inconsistent with the notion that a misrepresentation by an Executive Branch official should *nullify* the clearly expressed dictates of Congress. Surely this point goes to the core of the constitutional mandate of separation of powers, not to its periphery.[3] Moreover, respondent's argument that this Court should alter its interpretation of sovereign immunity to allow a greater exercise of equitable remedies itself raises separation of powers concerns. Insofar as this Court reshapes fundamental jurisdictional doctrines, it violates the premises upon which Congress has legislated.

[3] Thus, contrary to respondent's contention (Br. 30), this Court has consistently recognized that estoppel cannot be applied to allow the Executive and Judicial branches to override congressional mandates expressed by law. See, *e.g.*, *Dixon* v. *United States*, 381 U.S. 68, 73 (1965); *Snyder* v. *Buck*, 340 U.S. 15, 19 & n.6 (1950); *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 408-409 (1917); *Pine River Logging Co.* v. *United States*, 186 U.S. 279, 290-291 (1902); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 676-677, 679-681, 682-683 (1869); see also *INS* v. *Pangilinan*, 486 U.S. 875, 883-885 (1988) (court cannot exercise equitable powers in violation of congressional commands); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 383-384 (1947) (emphasizing that authority of government agents is defined by Congress, or by rule-making power delegated to them by Congress).

Respondent has no answer to the structural evidence we present that Congress, save when it explicitly directs otherwise, has reserved to itself the determination when a waiver of the law is appropriate. The suggestion that the courts have general authority to estop the government some of the time, and that Congress acts when the courts cannot (Resp. Br. 32-33), is misguided. Rather, there is no principled difference between the work done by Congress through private bills, and that urged upon the Court in this instance. As we note below (p. 8, *infra*), estoppel is no more warranted in this case than it was in *Schweiker* v. *Hansen*, 450 U.S. 785 (1981); just as in the aftermath of *Hansen* and the lower court cases that followed it,[4] a legislative response would be available here if Congress so desired.

c. Respondent does not reply to our point that even in the presence of "affirmative misconduct," estoppel against the government violates basic jurisdictional and structural principles (see Gov't Br. 37-38). He states (Resp. Br. 35-36, 47) only that under an "affirmative misconduct" test, estoppel would be invoked less often.[5] But respondent's

[4] Section 10302 of the Omnibus Budget Reconciliation Act of 1989 waives statutory application requirements for individuals if they were rendered ineligible for certain benefits because, relying on misinformation from a government official, they failed timely to apply. Pub. L. No. 101-239, 103 Stat. 2481-2482.

[5] Respondent's suggestion (Br. 40) that there be a "proprietary" function prerequisite to estoppel similarly fails to mitigate the severe doctrinal problems inherent in estoppel against the government. Moreover, any such distinction between "proprietary" and "govern-

discussion of affirmative misconduct reveals its difficulties: he acknowledges (Resp. Br. 48) that there can be no "objective test" for affirmative misconduct, and that the myriad of considerations to be weighed "cannot realistically be incorporated into a single definition." These conclusions are underscored by the welter of approaches to "affirmative misconduct" that now exists in the courts of appeals. See Pet. 21-22.

Similarly, respondent does not suggest how the fact that misinformation occurs in writing can serve to ease the severe legal obstacles to estopping the government. Respondent does not even cite or attept to deal with decisions of this Court (such as *United States* v. *Stewart*, 311 U.S. 60 (1940)) refusing to estop the government on the basis of reliance on written misinformation.[6] See Gov't Br. 22-23 & n.20, 45, 46-47. And on the level of administration, any rule distinguishing between oral and written misrepresentations would only be counterproductive in its effect on the government's willingness to commit itself to written advice. In the vast majority of cases, that advice is helpful and should not be discouraged.

2. Beyond the difficulties of demonstrating that estoppel of the government can be reconciled with fundamental principles of sovereign immunity and separation of powers, respondent makes a simpler assertion: this Court, he argues (Br. 17-20), has estopped the government before and, therefore, should do so again. But as Judge Friendly

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mental" functions has been rejected by this Court and others. See *Merrill*, 332 U.S. at 383-384 & n.1; Note, *Estopping the Federal Government: Still Waiting for the Right Case*, 53 Geo. Wash. L. Rev. 191, 196-197 (1985); see generally Pet. 20 n.14.

[6] Indeed, in some of these decisions, and unlike the present case, the party claiming estoppel relied on a written response or representation tailored specifically to it. See, *e.g.*, *Automobile Club* v. *Commissioner*, 353 U.S. 180, 182 (1957); *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666 (1869).

aptly put it in replying to a similar claim, this is an instance of "the wish being father to the thought." *Hansen* v. *Harris*, 619 F.2d 942, 950 (2d Cir. 1980) (dissenting), rev'd *sub nom. Schweiker* v. *Hansen*, *supra*.

Respondent founds his argument largely on *Moser* v. *United States*, 341 U.S. 41 (1951). As we have already noted (Br. 40-41), this Court in *Moser* explicitly declined to resolve the issue "on the basis of any estoppel." 341 U.S. at 47; see also *Heckler* v. *Community Health Services*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring in the judgment). Not surprisingly, therefore, *Moser* is not the "structurally identical" case respondent claims (Resp. Br. 17) it to be: it differs both in rationale and in the nature of the interest at issue.

With respect to the Court's rationale in *Moser*, we have explained (Br. 40) in our opening brief the basis of our belief that the result—refusing to allow an alien's claim of draft exemption to debar him from seeking American citizenship in the absence of a knowing waiver—was grounded in the statutory scheme.[7] No such contention can be made in this case: no part of the statutory scheme at issue here expressly or implicitly conditions the loss of eligibility for benefits on an intentional waiver. To the contrary, here (as in many comparable cases), eligibility for a particular benefit is to be determined by the application of objective criteria. In this instance, the measure is a fixed percentage of annual earnings.

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[7] The Court's analysis also appears to have been informed by due process considerations, given the references to "elementary fairness" and "entrap[ment]." *Moser* v. *United States*, 341 U.S. 41, 47 (1951); see Gov't Br. 40 n.38. As we have noted (Br. 39-40), this Court's decision in *United States* v. *Pennsylvania Industrial Chemical Corp.* (*PICCO*), 411 U.S. 655 (1973), is similarly based. See, *e.g.*, Note, *Equitable Estoppel of the Government*, 79 Colum. L. Rev. 551, 569 n.112 (1979).

Like their rationales, the statutory interests at stake in *Moser* and this case also differ. Moser had a right to apply for citizenship in the absence of a proper waiver. Respondent, on the other hand, had no right—vested or otherwise—to a disability annuity if he was not eligible to receive it. Thus, his argument (Resp. Br. 10, 18) that the benefit here had "vested" begs the very question at issue—whether he had satisfied the statutory requirements for eligibility.[8]

This case is "structurally similar" not to *Moser* but to *Schweiker* v. *Hansen, supra.* In *Hansen,* the claimant lost *eligibility* for benefits because of reliance on official misinformation, and despite respondent's protestations (Br. 38), Ms. Hansen's decision not to file an application is functionally equivalent to respondent's decision to take on extra work: each was a decision consciously made after an incorrect representation by a government official. And, just as respondent lost his benefits for a six-month period once he earned more than the statutory limit, so too did Ms. Hansen irretrievably lose benefits for every day she did not file.

In sum, the relevant precedents are consistent with the dictates of principle and of policy: the doctrine of estoppel, which evolved as a remedy for application between private parties, cannot be imposed on the legal relation between the government and individuals. As we have argued

[8] Respondent's quotation of a commentator who argues that estoppel serves to "ensur[e] that executive officials cannot block benefits from going to those whom Congress intended to have them" is similarly inapt. Br. 32 (quoting Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government,* 53 U. Chi. L. Rev. 1026, 1043 (1986)). The undisputed effect of estoppel in this case would be to give respondent benefits for a year in which he earned more than the specific limit established by Congress as a condition to the receipt of such benefits.

(Br. 28-34) and as this Court has recognized in similar cases, the solutions lie elsewhere—not in the courts but in Congress. See *Guidry* v. *Sheet Metal Workers Pension Fund,* No. 88-1105 (Jan. 17, 1990), slip op. 10; *INS* v. *Pangilinan,* 486 U.S. 875, 883-885 (1988).[9] That conclusion, of course, does not disable the courts from recognizing detrimental reliance when it is mandated by the Constitution[10] or by the terms of the statute at issue.

3. Respondent's efforts (Br. 37-49) to characterize this case as involving especially reprehensible government conduct and exceptional deprivation ring hollow. As we have already explained (Br. 44-47), even if estoppel could be

[9] In fact, Congress's most recent confirmation of this role is its action to remedy the denials of citizenship at issue in *INS* v. *Pangilinan,* 486 U.S. 875 (1988), and *INS* v. *Hibi,* 414 U.S. 5 (1973). See Filipino World War II Veterans' Naturalization Act, H.R. 525, 101st Cong., 1st Sess. (passed House, Nov. 13, 1989 (135 Cong. Rec. H8480 (daily ed. Nov. 13, 1989)); pending in Senate).

For recognition of the role of legislation in this area, see Schwartz, *Estoppel and Crown Privilege in English Administrative Law,* 55 Mich. L. Rev. 27, 37-38 (1956) (discussing provision generally prohibiting administrative sanctions given reliance on official misadvice); Berger, *Estoppel Against the Government,* 21 U. Chi. L. Rev. 680, 682 (1954) (commenting on similar Senate proposal); Newman, *Should Official Advice Be Reliable?—Proposals as to Estoppel and Related Doctrines in Administrative Law,* 53 Colum. L. Rev. 374 (1953) (similar); Note, *Equitable Estoppel: Does Governmental Immunity Mean Never Having to Say You're Sorry?,* 56 St. John's L. Rev. 114, 135 (1981) (discussing "plethora" of proposed and enacted bills promoting fair dealing by government agencies).

[10] Perhaps in response to our argument about the force of the Constitution itself in dealing with detrimental reliance (Gov't Br. 39-43), respondent half-heartedly suggests (Br. 46 n.27) that his case may raise a question of procedural due process. No such claim has previously been raised and for good reason: as stated in our opening brief (at 43), a negligent action such as the misrepresentation in this case does not raise questions of procedural or substantive due process.

applied against the government, nothing in this case would justify such an extreme step.

At the outset, we must object to respondent's unwarranted claims of agency misconduct. The record reflects that in 1986 a Navy personnel specialist misinformed respondent of current law, and gave him a copy of part of an OPM Federal Personnel Manual letter containing outdated information. (Petitioner was again misinformed by a Navy employee in 1987, but did not of course rely on that misrepresentation in accepting work during 1986.) The record does not support the contention that OPM itself was at fault for the mistake, much less that it had "maintained a blatantly erroneous position for years" or had deliberately supplied the public with misinformation. Resp. Br. 49, 35-36. Rather, the public record establishes that OPM timely published letters and supplements to the FPM detailing the 1982 amendment.[11] There is no indication that OPM failed to use its regular distribution system (distribution of all FPM material to the Navy is done in bulk to a Navy distribution point in Philadelphia) to dis-

[11] OPM issued the letter given respondent in 1981. See FPM Letter 831-64, Att. 4, at 2 (Apr. 3, 1981). (The attachment is reproduced at Gov't Br. App. 1a-3a.) Later that year, OPM began revising its supplement on retirement, alerting FPM subscribers to use Letter 831-64 until later installments were received. See FPM Supp. 831-1, Inst. 31, at 1 (Sept. 1, 1981). Upon Congress's amendment of 5 U.S.C. 8337(d), OPM immediately published news and explanation of the amendment before its effective date on January 1, 1983, and reiterated that explanation in a retirement supplement eight months later. See FPM Letter 831-75, at 5 (Nov. 4, 1982); FPM Letter 831-78 (revised Supp. 831-1), at 1, Att. 1 at 18 (June 23, 1983). (Copies of these letters have been lodged with the Court.)

Thus, although FPM Letter 831-64 was not formally superseded until 1989, subsequent letters made clear that it was effectively obsolete as of 1983. See FPM Chap. 171-6, para. 2-7 (June 10, 1986) (later issued information supersedes any earlier instructions in conflict).

seminate these updates. Rather, it appears that the staff of the Navy Public Works Center in San Diego simply failed correctly to file the updates, and thus erroneously gave out the misinformation.[12]

a. Respondent argues (Br. 40-46) that he reasonably relied on the outdated information furnished to him. However, respondent here obtained incorrect information not, as he asserts (Br. 20), from OPM (the agency responsible for administrating the Civil Service Retirement Act), but from Navy personnel staff. The hand-out, while carefully written to explain the law before amendment, was obviously not an individualized response when given respondent. Compare *Community Health Services,* 467 U.S. at 65. And, the information was clearly contradicted by the plain terms of the statute.

There is no "reasonable reliance" warranting estoppel if a party "with reasonable diligence * * * could acquire the knowledge [exposing the misrepresentation] so that it

[12] We note also that the FPM manual and supplementing material is not "[OPM's] main channel of communications with annuitants." Resp. Br. 49; see also *id.* at 13. While OPM may include attachments to FPM issuances that can be passed out to current government employees, the FPM is explicitly designed for and distributed to federal personnel officers. See FPM Introduction, Inst. 348, at 1 (Mar. 17, 1989); FPM Chap. 171-5, paras. 2-1, 2-3 Inst. 332 (June 10, 1986). Compare *PICCO, supra,* where the Court stressed that the public had a right to depend on a published regulation. See 411 U.S. at 674.

Rather than using the FPM, OPM communicates directly with its annuitants. Respondent thus received from and returned to OPM each year an annual income report form. (Respondent is mistaken in claiming (Resp. Br. 45 n.26) that under *Jones* v. *OPM,* 37 M.S.P.B. 99, 102 (1988), OPM may have had an affirmative statutory obligation to notify annuitants about the earning capacity amendment. On remand, the administrative judge in *Jones* confirmed that there is no such duty. *Jones* v. *OPM,* No. AT08318710630-1, at 4 (M.S.P.B. Oct. 18, 1988).)

would be negligence on his part to remain ignorant." See *Community Health Services,* 467 U.S. at 59 n.10 (quoting 3 J. Pomeroy, *Equity Jurisprudence* § 810, at 219 (S. Symons 5th ed. 1941)). We have shown (Br. 44-45) that it is not unreasonable to expect citizens to use the published United States Code to confirm important information; this Court has repeatedly and recently so ruled. See, *e.g., Community Health Services,* 467 U.S. at 63. Indeed, the government could not operate if it could not generally rely on publication in the U.S. Code and the Code of Federal Regulations to serve as notice of the requirements of the law.[13]

Respondent's suggested alternative (Br. 43, 44) is to adopt an approach that would evaluate "all relevant factors in a given case to determine what degree of legal sophistication was reasonable" and would assume "[s]ome degree of presumed knowledge * * * [that] will have a different significance in each case – with the different circumstances of each case determining its relative importance." This open-ended approach is an invitation to litigation; indeed, it would be difficult if not impossible to apply in any consistent and predictable way. It is, for example, quite likely that when Ms. Hansen applied for "mother's insurance benefits," she had scant legal knowledge of the Social Security Act. See *Hansen,* 450 U.S. at 786. Likewise, the petitioner's mother in *Montana* v. *Kennedy,* 366 U.S. 308 (1961), may well not have had access to the United States Code in Italy. Respondent's approach invites the application of estoppel in these and countless other cases. In the

[13] The duty of citizens to know the law underlies the use of publication as notice in a variety of situations. See, *e.g., Atkins* v. *Parker,* 472 U.S. 115, 130-131 (1985); *Texaco, Inc.* v. *Short,* 454 U.S. 516, 531-532 (1982); *Anderson National Bank* v. *Luckett,* 321 U.S. 233, 243 (1944); *North Laramie Land Co.* v. *Hoffman,* 268 U.S. 276, 283 (1925).

end, the results may well be less fair and more arbitrary than under the long-established rule that, unless otherwise required by the terms of the statute or by the Constitution, all citizens are charged with knowledge of the law.

b. Respondent admits (Br. 11, 35) that "run-of-the-mill" mistakes by government employees do not amount to "affirmative misconduct" sufficient to estop the government. In this case, the fact that respondent lost approximately $3,993 in reliance on the negligent mistake of a Navy personnel specialist does not make that mistake extraordinary. Indeed, the failure of an employee correctly to file an FPM letter or to keep a complicated manual in order is as routine an error as one might imagine. It is manifestly less egregious than the conduct at issue in such cases as *Montana* and *INS* v. *Hibi,* 414 U.S. 5 (1973).

The courts of appeals today are well aware that no appellate court decision applying estoppel against the government has ever been upheld by this Court, and they have repeatedly expressed the difficulties of acting in this area. See, *e.g., Akbarin* v. *INS,* 669 F.2d 839, 842-843 (1st Cir. 1982); *Home Savings & Loan Ass'n* v. *Nimmo,* 742 F.2d 585, 586 (10th Cir. 1984); *Chien-Shih Wang* v. *Attorney General,* 823 F.2d 1273, 1276 (8th Cir. 1987). Adoption of respondent's argument would change all this: if the error here qualifies as a mistake of such magnitude that the courts must disregard the requirements imposed by Congress, then estoppel of the government, with all of its inherent problems on the levels both of principle and practice, may well become a commonplace event.

In our view, the orderly and proper administration of justice is far better served by limiting remedies for detrimental reliance to those occasions on which such a remedy is warranted by the relevant statute or required by the Constitution. That course would avoid grave intrusion into the legislative sphere; it would forestall the great ex-

pense to the government of defending against claims easily made and difficult to disprove; and it would avert the heavy and perhaps unsustainable burden on the courts of articulating acceptable standards for excusing compliance with the requirements of law.

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For the foregoing reasons, and those stated in our opening brief, the judgment below should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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